SALAK PARK DEVELOPMENT SDN. BHD.

v.

FAJAR MENYENSING SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
TUAN LOW HOP BING JC
[CIVIL SUIT NO. D4-22-744-94]
19 SEPTEMBER 1994

COMPANY LAW: Petition by defendant to wind up plaintiff-company - Alleged debt due on building contract - Damages for breach of contract - Injunction sought by plaintiff to restrain presentation of petition - Statutory notice under s. 218 of Companies Act 1965 served on plaintiff - Debt is disputed - Whether bona fide dispute of alleged debt - No judgment obtained by defendant against plaintiff for alleged debt - Whether presentation of winding up petition is an abuse of process - Inherent jurisdiction of Court to inject presentation of petition - Whether winding up can be resorted to settle disputed debt.

This is an application by the plaintiff for an injunction restraining the defendant whether by themselves or their agents from presenting a winding-up petition until the issue of the debt allegedly due and owing by the plaintiff to the defendant is heard by a Court competent jurisdiction.

Held:

[1] In the instant case, on the facts there is a *bona fide* dispute as to the alleged debt, i.e. there is an honest belief that a dispute exists and the belief is based on substantial grounds, and is not frivolous.

[2] In the circumstances, the Court should exercise its discretion to grant an injunction to restrain the presentation and advertisement of the petition.

[3] Where a petition against a company is presented ostensibly for a winding-up order but in reality for another purpose such as to bring pressure to bear on the company, the Court has an inherent jurisdiction to prevent such an abuse of process and will do so by injunction.

[Plaintiff's application allowed].

Cases referred to:

Bina Satu Sdn. Bhd. v. Tan Construction [1988] 2 CLJ 652/[1988] 1 MLJ 534 ***(refd)***
Re A Company [1894] 2 Ch 349 ***(refd)***
Re Lympne Investments Ltd. [1972] 2 AER 389 ***(refd)***
Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd. [1988] 2 CLJ 649/[1988] 3 MLJ 49 ***(refd)***
Re Nima Travel Sdn. Bhd. [1986] 2 MLJ 374 ***(refd)***
Ng Ah Kway v. Tai Kit Enterprise Sdn. Bhd. [1986] 1 MLJ 58 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 217, 218,
Companies Act 1948, s. 224(1) (UK)

Other sources referred to:

Buckley on the Companies Act 1948, 13th Edn.
Palmer's Company Law, 23rd Edn., p. 1117

For the plaintiff - A.K. Lee; M/s. A.K. Lee & Co.
For the defendant - Pradhar (Bhagwant Kaur with him); M/s. Paul Ong & Associates

JUDGMENT

Low Hop Bing JC:

The plaintiff's application (enclosure 4) is for an injunction restraining the defendant whether by themselves or their agents from presenting a winding-up petition until the issue of the debt allegedly due and owing by the plaintiff to the defendant is heard by a Court of competent jurisdiction. The application is supported by the affidavit of Tang Boon Hong (enclosure 3).

The defendant through it solicitors served on the plaintiff a notice dated 6 July 1994 under s. 218 of the Companies Act 1965 ("statutory notice") demanding payment of the sum of RM439,750.88, threatening that unless the said sum is so paid within 21 days a winding-up petition would be presented against the plaintiff.

In response to the defendant's statutory notice, the plaintiff had on 15 July 1994 through its solicitors disputed the alleged debt and stated that the plaintiff was far from insolvent.

In the plaintiff's solicitors' said letter, the plaintiff explained that the alleged debt arose from a building contract in which the defendant was appointed as contractor for the plaintiff which said contract was alleged to be breached by the defendant resulting in the plaintiff having to incur a loss of RM246,207.68.

The supporting affidavit affirmed by Tang Boon Heng on 6 August 1994 states, among other things, that the contract sum was paid by the plaintiff directly to the defendant's sub-contractors resulting in an overpayment of RM246,207.68.

The issue before the Court is whether there is a *bona fide* dispute of the alleged debt.

In the affidavit of Wong See Kwoang filed on behalf of the defendant, the defendant relies solely on the architect's certificates, i.e. the certificate of practical completion dated 5 June 1990 and the final certificate dated 15 December 1993.

It is submitted for the plaintiff that by its very nature an architect's certificate does nothing more than to certify that the works therein specified had been completed and to assess the volume of works done. The architect's certificate does not take into account sums previously paid by the plaintiff to or on behalf of the defendant nor does it certify who actually completed the works. The certificate also does not take into consideration any delay in completion of the works in relation to which the plaintiff may be entitled to liquidated damages.

The plaintiff's contention is that the whole of the contract sum was duly paid, long before the final certificate was issued, and paid in excess by RM246,207.68 for which a suit under Kuala Lumpur High Court Suit No. S4-22-404-94 has been filed for recovery. The dispute herein is clearly not whether the works have been completed but one as to whether or not the contract sum has been fully paid. In other words, there is a *bona fide* dispute on the alleged debt.

It is clear to me that the defendant has relied wholly and exculsively on the architect's certificate in isolation and has treated the sum of RM439,750.88 as the balance contract sum due and has not taken into consideration the total sum paid by the plaintiff in

respect of the contract. There is indeed a substantial *bona fide* dispute on the alleged debt. There is no judgment whatsoever recorded against the plaintiff in respect of the alleged debt.

I further hold that the plaintiff's dispute as to an over payment of RM246,207.68 puts the dispute on substantial grounds and the matter ought to be resolved in an action with pleadings and with the disputed questions of fact decided by *viva voce* evidence.

Besides, from the affidavits filed herein, I find that the plaintiff's solvency is beyond question. The plaintiff is a licensed housing developer undertaking the development of a housing project known as "Desa Petaling" comprising some 6000 units of residential and commercial premises and the project is on-going. The presentation of a winding-up petition when there is a substantial *bona fide* dispute as to the alleged debt is an abuse of the process of Court. In **Palmer's Company Law,** 23rd Edn. at page 1117 the learned author says:

> Where there is a *bona fide* dispute as to the debt, the company cannot be said to have neglected to pay on a statutory demand. Coupled with this is a related general principle that a petition for winding-up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs.
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> *Bona fide* dispute means "the dispute must be *bona fide* in both a subjective and an objective sense. It must be honestly believed to exist and must be based on substantial or reasonable grounds. 'Substantial' means having substance and not frivolous ...

In the instant case, I find on the facts that the debt is disputed *bona fide* i.e. honestly believed to exist and is based on substantial grounds, and not frivolous. In the circumstances, the Court should exercise its discretion to grant an injunction to restrain the presentation and advertisement of the petition: *ibid* page 1118.

It is also my finding that the statutory notice issued by the defendant is a step taken with a view to the presentation of a winding-up petition when the alleged debt has not been crystallised into a judgment sum. It is indeed intended to serve a collateral purpose i.e. to bring pressure to bear on the plaintiff in order to pay the alleged debt which is *bona fide* disputed on substantial grounds. Where a petition against a company is presented ostensibly for a winding-up order but in reality for another purpose such as to bring pressure to bear on the company, the Court has an inherent jurisdiction to prevent such an abuse of processs and will do so by injunction: George J. in *Bina Satu Sdn. Bhd. v. Tan Construction* [1988] 1 MLJ at page 534 following *Re A Company* [1894] 2 Ch 349.

Megarry J. in *Re Lympne Investments Ltd.* [1972] 2 AER at page 389 said:

> The Companies Court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding-up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out. Further, *Mann v. Goldstein* ... provides authority for saying that when a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a 'creditor' within s. 224(1) of the Companies Act 1948 who has the *locus standi* requisite for the presentation of the petition ...
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> I do not see how it can be said that the person 'neglects' to do an act if the reason for not doing it is a genuine and strenuous contention, based on substantial grounds, that the person is not liable to do the act at all.

Zakaria J. in *Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd.* [1988] 3 MLJ 49 held that:

> the question for the Court to consider is whether the petitioner is a creditor and the respondent company is a debtor. ...where a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a creditor... It has no *locus standi* ...
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> From the evidence adduced before this Court, it is clear that the respondent company has *bona fide* disputed the alleged debt claimed by the petitioner. Indeed, the respondent company claims that the petitioner is in a debit balance to the extent of RM1,039,744. In the circumstances, the petitioner is not a creditor as envisaged in s. 217 of the Companies Act. Therefore, the petitioner is not entitled to issue the statutory notice or file the petition, as it has no *locus standi*. The action of the petitioner in issuing the notice and filing the petition is an abuse of the process of the Court.

So too in *Re Nima Travel Sdn. Bhd.* [1986] 2 MLJ 374 which reaffirms that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the company. Shankar J. went further to hold that where there is a substantial dispute which should have been apparent to the petitioner, the continuation of the winding-up proceedings after they had that knowledge was not a permissible exercise of the process of the Court. The proper course for the petitioner was to establish its debt by filing an action to have the matter adjudicated upon in the usual way.

In *Ng Ah Kway v. Tat Kit Enterprise Sdn. Bhd.* [1986] 1 MLJ 58 at page 64 Shankar J. quoted **Buckley on the Companies Act 1948** 13th edn. as follows:

> Great damage may obviously be done to a solvent company by a winding-up petition presented by an unreasonable creditor, whose debt the company are able and willing to pay if established, but to whom they *bona fide* believe they are not indebted. In such a case, on a writ issued by the company, an injunction will be granted to restrain the creditor from presenting a petition.

The learned Judge further observed that a petition for the winding-up of a company is a serious matter as it affects the reputation of the company and that the petition for winding-up cannot be resorted to settle disputed debts. The proper course for the petitioner is to file a civil suit for determining the disputed claims. I fully agree with this observation.

In the circumstances, I allow the application in enclosure 4 and make an order in terms as prayed.